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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 725

In re JAMES CONWAY, trading as Conway Negligees, Conway Beach Togs, and Weehawken Knitting Mills,
Petitioner,

GERALD D. STONE, Trustee, and COMMERCIAL FACTORS CORPORATION,
Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES CONWAY, in person.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Specifications of Errors	5
Reasons for Granting the Writ	6
Conclusion	10

TABLE OF CASES CITED:

Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 (1935)	9
Monongahela Navigation Co. v. *United States*, 148 U. S. 312 (1893)	9
Kuehner v. *Irving Trust Co.*, 299 U. S. 445 (1937)	9

OTHER AUTHORITIES CITED:

Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347): Section 240(a)	2
Chandler Act:	
Section 376(2)	2, 3, 5, 6
Section 336(3)	2, 3, 5, 6, 7, 8, 10
Section 376	3, 8
Section 336	3, 7

PAGE

Constitution of the United States:
Fifth Amendment 5, 9, 10

United States Supreme Court Rules:
Rule 38(5)(b) 6

Congressional Record, June 1937 re Chandler Act... 7

The Bankruptcy Act:
Section 12A 6
Section 74D 6

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Petitioner.

GERALD D. STONE, Trustee, and COMMERCIAL FACTORS CORPORATION,
Appellants.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The undersigned, on behalf of the above named petitioner, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on July 1st, 1941 reversing the decision of the District Court of the United States for the District of New Jersey.

Opinions Below.

The opinions of the Court below have not as yet been officially reported. They will be found at pages 25 and 33 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 30, 1941 (R. 33, 34). Jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

Questions Presented.

1. Whether or not the Referee in Bankruptcy erred in adjudicating the debtor a bankrupt when the debtor was solvent and had not committed an act of bankruptcy.

2. Whether or not the Referee in Bankruptcy erred in adjudicating the debtor a bankrupt in accordance with Section 376 (2) of the Chandler Act without an examination of the debtor, which is mandatory, as required by Section 336 (3) of the Chandler Act.

Statutes Involved.

The statutes involved are Sections 376 and 336 (3) of the Chandler Act.

Statement.

James Conway filed a petition for an arrangement under Section 322 of Chapter XI of the Chandler Act. That thereafter notices were duly sent out by the Referee in Bankruptcy advising creditors of the said James Conway that a first meeting of creditors would be held pursuant to Section 336 of said Act. Thereafter, said meeting was held and subsequently upon a vote duly taken, the said James Conway was unable to secure a majority of consents to his Plan of Arrangement from his creditors. Thereafter, notices were sent out by the said Referee in Bankruptcy ad-

vising that in accordance with Section 376 of the Chandler Act, the Referee in Bankruptcy would decide whether or not to adjudicate or dismiss the proceedings in accordance with the said Act. Said meeting was held on October 25th, 1940 and the said James Conway was adjudicated a bankrupt. On the 4th day of November, 1940, the said James Conway filed a petition for review with the Referee in Bankruptcy contesting the said order of adjudication. The matter duly came on before Judge Guy L. Fake of the United States District Court and by order dated December 11th, 1940 the said adjudication was set aside and the matter was referred back to the Referee to hold a proper meeting in accordance with Section 336 of the Chandler Act.

Thereafter a new first meeting of creditors was held by the Referee in Bankruptcy in accordance with Section 336 (3) of the Chandler Act and the debtor, for the first time, was duly examined. The Referee thereafter set the 11th day of February, 1941 as the last day of filing consents to the Plan of Arrangement.

Section 376 (2) of the Chandler Act provides in substance that where a Plan of Arrangement is not accepted by creditors after due notice to creditors, the Court may adjudicate or dismiss whichever in the opinion of the Court is for the best interest of the creditors.

On the 11th day of February, 1941, the Referee in Bankruptcy, again adjudicated the debtor a bankrupt, holding that the debtor did not have sufficient consents to his plan of arrangement. The Referee permitted three creditors to withdraw their consents from the plan of arrangement. The debtor submitted a new petition for review of the Referee's decision, and same was duly granted by the District Court,

which Court held consents to the arrangement could not be withdrawn in the absence of fraud or misrepresentation. The District Court returned the matter to the Referee in Bankruptcy and directed him to proceed with the arrangement. In the interim an appeal was taken to the Circuit Court of Appeals, Third Circuit, from the order of the District Court dated December 10, 1941 and on June 30, 1941 the said Circuit Court of Appeals (R. 33) unanimously reversed Judge Fake and reinstated the adjudication of October 25th, 1941, and by its mandate (R. 33) directed that liquidation be proceeded with.

In the case at bar, the record is void of any facts or information which guided the Referee in adjudicating the debtor herein a bankrupt. The only record before the Referee was the petition filed by the debtor herein. The petition filed by the debtor showed the following conditions to exist:

The debtor owed approximately $44,500.00 to unsecured creditors and to preferred creditors, including taxes, approximately $9,000.00. The debtor's assets consisted of the following:

Approximately $21,000.00 of Accounts Receivable, around $5,000.00 in banks, saleable inventory of approximately $32,000.00, merchandise and machinery of approximately $18,000.00 and other assets amounting to $1,000.00. The debtor clearly had an excess of assets over liabilities of $23,000.00. The petition further showed that the debtor was engaged in the negligee business. It is common knowledge that the negligee business is primarily a Christmas business so that at the time of the adjudication, which was October 25th, 1940, the debtor was in a more liquid posi-

tion than he was at the time of the filing for a petition of arrangement.

From the record before the Referee at the time of his deciding whether to adjudicate or dismiss, it becomes self-evident that the best interest of creditors would be served by dismissing the arrangement proceedings, than to adjudicate the debtor a bankrupt. It is common knowledge that assets sold at liquidation bring a fraction on the dollar of their actual value. Furthermore, the $21,000.00 of Accounts Receivable existing at the time of the filing of the petition were practically collected, as it is a known fact that in the negligee business the terms of sale average 5/10 Eom.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In reversing the order of the District Court.

(2) In holding that it was not necessary to find that the debtor was insolvent before he could be adjudicated a bankrupt under Section 376 (2) of the Chandler Act.

(3) In so construing Section 336 (3) of the Chandler Act as to hold that the examination of the debtor under said section could be waived by the debtor, and that said section was no right of the debtor, but solely a right for creditors and the Referee.

(4) In holding that its said construction and application of said statutes did not violate the Fifth Amendment to the Constitution.

Reasons for Granting the Writ.

In holding that petitioners need not be examined under Section 336 (3) of the Chandler Act, and that insolvency is not a prerequisite under Section 376 (2) of the Chandler Act, the Circuit Court of Appeals decided important questions of federal law which have not been, but should be, settled by this Court (Rule 38 (5) (b)).

(1) No Court other than the Court below has interpreted Sections 336 (3) and 376 (2) of the Chandler Act so as to take away one's property without a proper hearing and without a finding of insolvency.

Section 336 of the Chandler Act, Subdivision (3) provides as follows:

> "At such meeting or at any adjournment thereof, the Judge or Referee shall examine the debtor or cause him to be examined and hear witnesses on any matter relative to the proceeding."

This section was derived from the old act, Sections 12A and 74D. Under the law statutes this examination by the Referee was a permissive statute. With the enactment of the Chandler Act this section was changed so as to make it mandatory upon the Referee in Bankruptcy to hold an examination of a debtor. The reasons for the change become self-evident after slight thought. The Chandler Act was enacted to afford individuals or corporations who were unable to pay their debts as they mature, an extension of time for the payment of same. Congress in enacting the Chandler Act found fault with the old bankruptcy laws and decided that the best interests of all

parties concerned would be served by having debtors examined by the Referee. With such an examination, the creditors would be in a position to determine whether or not to accept a proposed Plan of Arrangement. It is a known fact that while a debtor will list in his schedules numerous assets, it is necessary for someone to inquire into the nature of the business of the debtor and ascertain whether or not the proposed Plan of Arrangement is feasible and fair under the circumstance. Without an examination as required by Section 336 of the Chandler Act, Subdivision (3), it is conceivable why creditors in the case at bar refused to accept the proposed Plan of Arrangement calling for payment of One Hundred (100%) Per Cent over a period of time. Since the reversal by Judge Fake, the Referee held an examination of the debtor pursuant to the said Section 336, the debtor has been able to secure a majority of consents in number and amount as required by the Act. It therefore becomes apparent that the argument of the Circuit Court that the failure to examine is a harmless error, is absurd on its face. If the error was harmless and the examination intended by the Act was to be a cursory one, why is it that since the examination was held that the debtor was able to obtain sufficient consents to his Plan of Arrangement; *after having been examined at the meeting of creditors.*

> See Congressional Record, June, 1937 re Chandler Act.

An examination under Section 336 serves another purpose than that of advising creditors as to the possibility of accepting a Plan of Arrangement. In the event a Plan of Arrangement is not accepted, the secondary purpose of the examination is to afford a

Referee in Bankruptcy, when he comes to Section 376 of the Act, an opportunity to decide upon facts what is the best interest of creditors, in regard to whether to adjudicate or dismiss the proceedings. By examining the debtor at the first meeting of creditors, the Referee in Bankruptcy is able to ascertain whether or not the best interest of creditors will be served by adjudicating the debtor concern a bankrupt or in dismissing proceedings. In the case at bar, we find that no such examination as required by the Act was held. It is hard to understand upon what grounds the Referee decided what the best interest of creditors would be served by adjudicating the debtor a bankrupt herein. The only thing before him was the petition filed by the debtor. If that was the source of his information then the Referee erred in adjudicating the debtor a bankrupt herein. The reason is that the petition showed $23,000.00 of assets over liabilities.

The Circuit Court, in holding that the examination of the debtor under Section 336 (3) in no wise affects a debtor, but is merely for the guidance of creditors, the Referee assumed that the debtor has no rights to the examination, all of which is fallacious. The purpose of the new Chandler Act was to permit honest individuals, engaged in business, to continue in business, by obtaining for them an extension of time to pay their obligations. In the case at bar, the debtor had been in business for over eighteen years, untainted by fraud or chicanery, desirous of paying his creditors over a period of time. Can it be said that the debtor had no interests or rights in the proceedings, or that the failure to examine was harmless error? The Circuit Court goes to great length in its opinion (R. 29) to stress the purpose of the Bank-

ruptcy Act, quoting Senator Ingalls of Louisiana to the effect that "* * * to destroy an honest business house where he has an abundance of assets to meet every obligation would seem an act of wantonness which ought not to be tolerated * * *" yet in the next breath it destroys the business of the debtor, claiming that he should not bite the hand that dispenses mercy to him. In elementary dialectics the logic of the Circuit Court would be a *non sequitor*. The ruling of the Circuit below is most novel and strange, it would work undue hardships and misfortune upon debtors to the extent that the powers of this Court should be invoked to clarify the situation and interpret the Chandler Act so that it will carry out the intention of Congress to alleviate the misery of honest business people who find themselves in a solvent but frozen condition. To permit debtors to be adjudicated without the necessary examinations as to their assets and liabilities, and as to the best manner of conducting the proceedings, would beyond a peradventure of a doubt, violate the fifth amendment (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589 (1935); *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336 (1893); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451 (1937)).

The present business conditions warrant liberal bankruptcy laws, not for the dishonest and mountebank, but for the man of integrity, who, through conditions beyond his control, finds himself unable to pay his debts as they mature. What a travesty and mockery it would be to destroy a business whose only crime is that the sweeping tide of world unrest has caused them to enter our bankruptcy courts seeking relief, only to be told you have no rights, don't complain, else you are an "ungrateful scoundrel". The

Circuit Court in its opinion seems to lay great stress on the purpose of the Bankruptcy Act, then with the speed of a bolt of lightning, makes a complete somersault and says don't bite the hand that feeds you (R. 31). To follow the logic of the Circuit Court, the conclusion is inevitable that a debtor has no rights, to attempt to protest such an arbitrary and capricious ruling brands him as an ingrate.

This Court cannot in good conscience permit this honest debtor, James Conway, or others, who may be so unfortunate in the future, to be deprived of their life's work and toil without a hearing or examination which is mandatory by Section 336 (3). To permit such a condition to exist would circumvent the purpose of the Chandler Act and make honest men shun the supposedly welcome arms of the bankruptcy courts when they are in distress. Public policy demands that a debtor be examined before he can be adjudicated, especially where he is solvent.

Conclusion.

In adjudication the petitioner a bankrupt without the mandatory examination required by Section 336 (3) the Court below acted capriciously and violated the Fifth Amendment which act should be reviewed by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES CONWAY,
Debtor in Person.

State of New York,
City of New York,
County of New York—ss.:

GEORGE HOROWITZ, being duly sworn, deposes and says that he is the counsel for James Conway, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the within record and writ of certiorari have been filed one month late, for the reason that your deponent erred in computing his time to prepare the said papers. This matter is of vital concern to the client and would prove very detrimental to him, to punish him for the error of counsel. This request is being most humbly made by the errant.

Deponent further says that the reason this verification is made by deponent and not by James Conway is because the said petitioner is a New Jersey resident, and deponent is its counsel.

GEORGE HOROWITZ.

Sworn to before me this
30 day of October, 1941.

ROBERT B. NATHAN,
Notary Public,
New York County.

(22)

NOV 26 1941

CHARLES ELMORE CROPLEY
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In re JAMES CONWAY, trading as Conway Negligees, Conway Beach Togs and Weehawken Knitting Mills,
Petitioner,

GERALD D. STONE, Trustee, and COMMERCIAL FACTORS CORPORATION,
Respondents.

BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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SUBJECT INDEX.

	PAGE
TABLE OF CITATIONS	ii
QUESTIONS PRESENTED	1
STATEMENTS OF THE CASE	2
ARGUMENT	3
I. Neither insolvency in the bankruptcy sense nor an act of bankruptcy is a condition precedent to adjudication of a debtor under Sec. 376 of Chapter XI of the Bankruptcy Act	3
A. The Issue	3
B. Decisions and Analogous Legislation	5
(a) Extensions and compositions	5
(b) Corporate reorganizations	6
(c) Relief for farmers	6
(d) Railroad reorganizations	7
(e) Miscellaneous provisions	7
II. The failure to examine the debtor at the first meeting of creditors had no bearing on the result reached after hearing under Sec. 376	8
CONCLUSION	11

Table of Citations.

PAGE

Cases

Campbell vs. *Allegheny Corporation*, 75 F. (2) 947.. 6
Clinton, In Re, 41 F. (2) 749..... 8
Collins vs. *Welsh*, 75 F. (2) 894..... 5
Continental &c. Bank vs. *Chicago &c. Co.*, 294 U. S. 648 7
Dallas Joint Stock Land Bank vs. *Davis*, 83 F. (2) 322 6
Fox West Coast Theatres, In Re, 88 F. (2) 212.... 8
Johnson vs. *Zerbst*, 304 U. S. 456..... 11
Landquist, In Re, 70 F. (2) 929..... 5
Louisville Joint Stock Bank vs. *Radford*, 295 U. S. 555 7
Minnich vs. *Gardner*, 292 U. S. 48..... 10
National Ref. Co. vs. *Pennsylvania Petroleum Co.*, 66 F. (2) 914 8
New Rochelle Coal and Lumber Co., 77 F. (2) 881... 6
Pierce vs. *Somerset Railway*, 171 U. S. 641..... 11
Sterba, In Re, 74 F. (2) 413..... 5
United States vs. *Atkinson*, 297 U. S. 157..... 10
Wall vs. *Parrot Silver & Copper Co.*, 244 U. S. 407.. 11
West Co. vs. *Lea*, 174 U. S. 590..... 8

Bankruptcy Act.

Section 1 (19)..... 4
Section 3(a) and (b) 4

Chapter XI:
Section 323 4
Section 336 8
Section 376 (2) 3

Questions Presented.

I.

Is proof of insolvency or of the commission of an act of bankruptcy necessary before adjudging a debtor a bankrupt under Sec. 376(2) of Chapter XI of the Bankruptcy Act?

II.

Where a debtor under Chapter XI was not examined pursuant to the directions of Sec. 336 at a first meeting of creditors called under Sec. 334, does such failure to examine *per se* nullify a subsequent order of adjudication entered after hearing, under Sec. 376(2), where no objection to the non-examination was made by the debtor either at the meeting of creditors under Sec. 336, or at the hearing on the question of adjudication under Sec. 376?

Statement of the Case.

At the meeting of creditors held under Sec. 336, the overwhelming majority of creditors in number and amount affirmatively rejected the Plan of Arrangement. The Debtor was not examined at this meeting, but he did not object to this non-examination, nor did he request that he be examined.

To the order to show cause which issued under Sec. 376(2), the Debtor filed an Answer and Petition (R. 2), objecting to adjudication on the grounds that he was not "insolvent" and had not "committed an act of bankruptcy", and praying that the proceedings be dismissed. A hearing was held, but at no time did the Debtor object to adjudication on the ground that he was not examined at the first meeting of creditors under Sec. 336. In fact, this ground was not set forth in the Debtor's Petition for Review (R. 5), and it was first mentioned before the District Court in oral argument in the review proceedings (R. 27).

The Referee's order of adjudication was reversed by the District Court in December, 1940 (R. 14), on the ground that the Debtor had not been examined at the meeting of creditors held under Sec. 336, with directions to proceed further under Chapter XI. An appeal to the Circuit Court of Appeals resulted in a reversal of the District Court. After the mandate issued, the District Court, on August 11, 1941, entered an order reversing its prior order of December, 1940 and remanding the matter to the Referee for further proceedings. The Referee, by order of August 19, 1941, restored the *status quo ante,* as of December, 1940. The Debtor brought on before the District Court this last

order of the Referee, and on November 3, 1941 the District Court affirmed the Referee. On November 7, 1941 all of the assets of the Debtor were sold.

The requirement of conciseness forbids full comment on the Petitioner's financial picture (Brief, pp. 4-5). Suffice it to say that inventory, merchandise and machinery total $40,000.00—only in the opinion of the Debtor as stated in his petition under Chapter XI. As to the cash asset of $5,000.00, it represented money on deposit in a bank which seized and applied it toward the bankrupt's indebtedness of $8,000.00.

The opinion of the Circuit Court is reported in 121 Fed. (2) 972.

ARGUMENT.

I.

Neither insolvency in the bankruptcy sense nor an act of bankruptcy is a condition precedent to adjudication of a debtor under Sec. 376 of Chapter XI of the Bankruptcy Act.

A. The Issue.

Sec. 376 (2) of the Bankruptcy Act, under which the Referee entered the order of adjudication, pertinently reads as follows:

> "If an arrangement * * * is not accepted at the meeting of creditors * * * the court shall * * * (2) * * * enter an order, upon hearing after notice * * * either adjudging the debtor a bankrupt * * *

> or dismissing the proceedings under this chapter, whichever in the opinion of the court may be in the interest of the creditors." (11 U. S. C. A., Sec. 771.)

Despite the clear grant of power to courts of bankruptcy to adjudicate under these circumstances alone, the Debtor argued in his Answer and Petition (R. 2) and in his Petition of Review (R. 5) that the court could not adjudicate him a bankrupt unless the elements of "insolvency" and "an act of bankruptcy" were present, as set forth in Secs. 1 (19) and 3 of the Act which provides as follows:

> "Sec. 1 (19): A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts;" (11 U. S. C. A., Sec. 1 (19).
>
> "Sec. 3: a. Acts of bankruptcy by a person shall consist of * * *
>
> b. A petition may be filed against a person within four months after the commission of an act of bankruptcy * * *" (11 U. S. C. A., Sec. 21).

Solvent, or not, the debtor was financially embarrassed:

> "Sec. 323. A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature, * * * (11 U. S. C. A., Sec. 723).

The question is whether the congressional power to establish laws on bankruptcies (Article I, Sec. 8, Cl. 4, United States Constitution) embraces the power to estab-

lish laws governing the relationship between a financially embarrassed debtor and his creditors. Or, stated in terms of the case at bar, may Congress authorize courts of bankruptcy to adjudge a person a bankrupt even if he is solvent and has committed no act of bankruptcy?

B. Decisions and Analogous Legislation.

(a) Extensions and compositions.

The immediate predecessor of Chapter XI was Sec. 74 of the Bankruptcy Act (Mar. 3, 1933, Ch. 204, Sec. 1, 47 Stat. 1467, as amended June 7, 1934, Ch. 424, Sec. 2, 48 Stat. 922, 923; May 15, 1935, Ch. 14, Sec. 2, 49 Stat. 246). Under clause (a) a debtor had to allege insolvency or inability to pay his matured debts, and if a plan wasn't accepted by creditors at their meeting, the court could adjudicate the debtor a bankrupt under clause (1) without proof of insolvency or an act of bankruptcy.

The constitutionality of Sec. 74 was attacked on the ground that it attempted to bring within the jurisdiction of the federal bankruptcy courts the obligations and property of persons not insolvent, in the case of *In Re Landquist,* 70 F. (2) 929, C. C. A. 7, 1934, cert. den. 293 U. S. 584. The court disposed of the contention by saying that "Inability to pay has always been recognized as a proper cause of adjudication whether that inability were caused by the lack of assets or a lack of liquidity of assets." This position was reaffirmed by the same court a year later, *In Re Sterba,* 74 F. (2) 413, and was followed in *Collins* vs. *Welsh,* 75 F. (2) 894, (C. C. A. 9, cert. den. 295 U. S. 762).

(b) Corporate reorganizations.

There is a similar situation under Chapter X of the Bankruptcy Act governing corporate reorganizations. Sec. 130 (11 U. S. C. A., Sec. 530 (1) requires the petitioning corporation to allege insolvency or inability to pay debts as they mature, and if a plan is not accepted by creditors the judge may dismiss the proceedings or adjudicate the corporation a bankrupt under Sec. 236 (11 U. S. C. A., Sec. 636). The immediate predecessor of Chapter X was Sec. 77B of the Bankruptcy Act (June 7, 1934, Ch. 424, Sec. 1, 48 Stat. 912; amended Aug. 20, 1935, Ch. 577, 49 Stat. 664; Aug. 29, 1935, Ch. 809, 49 Stat. 965) where the provisions were encompassed in Sec. 77B (a) and (c) (8).

The same attack was made and again the statute was held constitutional in *Campbell* vs. *Allegheny Corporation,* 75 F. (2) 947, (C. C. A. 4, cert. den. 296 U. S. 581). The court said that, "All phases of the relationship between a debtor financially embarrassed and his creditors are brought under the control of Congress by the constitutional grant of power; and the fact that a particular mode has hitherto been employed in dealing with this relationship is not to be taken as a measure of the power over it." The same result was reached in *New Rochelle Coal and Lumber Co.,* 77 F. (2) 881, C. C. A. 2.

(c) Relief for farmers.

An analogous situation arose under the Farm Bankruptcy Act, Sec. 75 of the Bankruptcy Act (11 U. S. C. A., Sec. 203). In *Dallas Joint Stock Land Bank* vs. *Davis,* 83 F. (2) 322, (C. C. A. 5), the court said: "The authority of

Congress to make uniform laws on the subject of bankruptcy is a broad one. It extends to and authorizes not merely ordinary bankruptcy laws, as they were understood and in existence at the time of the adoption of the Constitution, but insolvency laws in general." And to the same effect is *Louisville Joint Stock Bank* vs. *Radford,* 295 U. S. 555.

(d) Railroad reorganizations.

Prior to Sec. 77 of the Bankruptcy Act (11 U. S. C. A., Sec. 205) a railroad could not be adjudged a voluntary or involuntary bankrupt (Sec. 4 (a) and (b) of the Bankruptcy Act). Under Sec. 77 the Congress authorized the bankruptcy courts to deal with railroads unable to pay matured debts, and this legislation, more novel than the legislative provisions involved in the case at bar, was held constitutional in *Continental Illinois National Bank and Trust Co.* vs. *Chicago &c. Co.,* 295 U. S. 648.

(e) Miscellaneous provisions.

There are similar provisions in Real Property Arrangements under Chapter XII of the Bankruptcy Act (11 U. S. C. A., Sec. 801) in Secs. 423, 481 and 482, and in Wage Earners' Plans under Chapter XIII of the Act (11 U. S. C. A., Sec. 1002) in Secs. 623 and 626.

Even under Chapter XI, a person merely unable to pay his matured debts may be adjudged a bankrupt if he fails to provide an indemnity bond (Sec. 327), or if he fails to carry out a confirmed arrangement (Sec. 376).

When our Debtor filed his petition under Chapter XI, the jurisdiction and powers of the bankruptcy court were

the same as if he had filed a voluntary petition for adjudication, Sec. 312 (2). If he had filed such a voluntary petition, the court could have adjudged him a bankrupt without any proof of insolvency or of an act of bankruptcy.

Re Fox West Coast Theatres, 88 F. (2) 212 (C. C. A. 9);
In Re Clinton, 41 F. (2) 749 (S. D. Cal.).

If an involuntary petition in bankruptcy is filed against a person under Sec. 4 (b) of the Bankruptcy Act, alleging as the act of bankruptcy a general assignment for creditors (Sec. 3 (a) (4), or the appointment of a general receiver (Sec. 3 (a) (5)), adjudication cannot be resisted by a debtor on the basis of his solvency.

West Co. vs. *Lea*, 174 U. S. 590;
National Ref. Co. vs. *Pennsylvania Petroleum Co.*, 66 F. (2) 914 (Cert. den. 291 U. S. 667).

II.

The failure to examine the debtor at the first meeting of creditors had no bearing on the result reached after hearing under Sec. 376.

On page 7 of the Petitioner's brief, he insinuates that the subsequent examination under Sec. 336 produced a majority of acceptances of the plan of arrangement. His conclusion is based solely on the fact that acceptances followed the examination in time. Naturally, the intervening conferences, meetings of the Creditors' Committee and the like, are not reported in the Record, and therefore the Record fails to disclose the true reason why the debtor was

able to obtain additional acceptances. However, it is only fair to this Court to point out that the examination under Sec. 336, which is referred to by the Petitioner as being influential, as strictly copied from the transcript of the testimony, discloses the following, in part:

> "Q. Will you tell us about this plan, its feasibility and fairness? * * * A. I will be glad to; we are offering you twenty per cent in cash and three notes of five per cent each, one payable August of this year and two payable next year; as to feasibility, we think enough of the plan to put up a bond, to put up part payment on the first twenty per cent of the $1,500.00, which was requested by the Committee.
>
> Q. Anything else you have to say? A. No.
>
> Q. Is there anything you want to say in connection with these proceedings that are now pending before the Court and the form of your application for confirmation of the plan and acceptance of the plan? A. No.
>
> Q. Is there anything you want to say to explain your plan further? A. The plan is self-explanatory.
>
> Q. Is there anything further you want to say to creditors so that they may better understand your plan or have better knowledge with reference to acceptance or rejection? A. Not knowing what questions will be in the creditors' minds, I cannot foretell. If they will ask me questions I will be glad to answer them.
>
> Q. There is nothing that you think you have to volunteer to assist them in understanding the situation better with reference to acceptance or rejection of the plan? A. No.
>
> Q. You say the plan is self-explanatory. A. I believe so.

> Q. Is this plan more self-explanatory than any other plan you have had on file here? A. I think all the plans are self-explanatory."

This portion of the examination, which continued further but which might have terminated there, rather forcefully indicates that the cry of the debtor for an opportunity to be examined under Sec. 336 is the creation of a sham issue.

On page 8 of the brief, Petitioner argues that an examination at the first meeting of creditors under Sec. 336 would have enabled the Referee to determine how to act under Sec. 376. The Petitioner overlooks the fact that a hearing is to be held and was held under Sec. 376 (R. 9). At that hearing the question was properly adjudication or dismissal, and an examination under Sec. 336 could not have been pointed toward these alternatives.

It is unquestioned that at the first meeting of creditors under Sec. 334 the debtor failed to request an examination and failed to object to his non-examination. At the hearing under Sec. 376(2) the prior non-examination was not presented as an objection to adjudication. The sole grounds relied on by the debtor were the fact that he was solvent, and did not commit an act of bankruptcy (R. 2, 6, 9, 27).

Minnich vs. *Gardner,* 292 U. S. 48;
U. S. vs. *Atkinson,* 297 U. S. 157.

The debtor does not object to the adjudication on the merits or on the ground that the Referee abused his discretion. Rather is his objection founded on the alleged lack of power of the Court to act under Sec. 376 because there was no examination under Sec. 336. However, if the Court

was powerless to adjudicate under Sec. 376, it was likewise powerless to dismiss under the same Section, yet the Petitioner asked the Court to exercise its power under Sec. 376 by praying for a dismissal (R. 2).

Petitioner's argument under the Fifth Amendment of the Constitution is without weight. The Circuit Court properly held that debtor could waive a constitutional provision intended for protection of his property rights.

Johnson v. *Zerbst,* 304 U. S. 456;
Wall v. *Parrot Silver & Copper Co.,* 244 U. S. 407;
Pierce v. *Somerset Railway,* 171 U. S. 641.

Wherefore it is respectfully submitted that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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